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February 7, 2011

VIA E-FILING

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Cynthia T. Brown
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: STB Ex Parte No. 697, Amtrak Emergency Routing Orders

Dear Ms. Brown:

In accordance with the decision served on January 6, 2011, in the above-referenced proceeding, please find enclosed the Comments of The Kansas City Southern Railway Company ("KCSR"). If there are any questions concerning the enclosed filing, please contact me by telephone at (202) 663-7823 or by e-mail at wmullins@bakerandmiller.com.

Sincerely,



William A. Mullins

Enclosures

cc: W. James Wochner
David C. Reeves

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB EX PARTE NO. 697

AMTRAK EMERGENCY ROUTING ORDERS

COMMENTS OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY

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**Attorneys for The Kansas City Southern
Railway Company**

Dated: February 7, 2011

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB EX PARTE NO. 697

AMTRAK EMERGENCY ROUTING ORDERS

COMMENTS OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY

In response to the Surface Transportation Board's ("STB's" or "Board's") Notice of Proposed Rulemaking published January 6, 2011 in the above-captioned matter (the "NPRM"), The Kansas City Southern Railway Company ("KCSR") submits these comments on the Board's proposal to establish rules for emergency access by Amtrak under 49 U.S.C. §24308(b).

Summary

KCSR believes that the rules proposed in the NPRM would leave carriers such as KCSR that do not have an operating agreement with Amtrak unheard and insufficiently protected. KCSR believes that the Board's proposed rules should provide slightly more flexible time frames and should require additional efforts by Amtrak and the Board to enable the carrier to which Amtrak seeks emergency access the opportunity to respond Amtrak's request; should provide full protection as to both liability and costs for the carrier hosting the emergency operation; and should require that Amtrak conform to operating requirements for freight trains on the affected lines. Finally, the Board should apply its proposed rules only in unforeseen circumstances of short duration. KCSR details its views of the Board's proposed rules in the following comments.

Background

KCSR approaches the Board's NPRM from a different viewpoint than many other potential commenters because KCSR does not have an operating agreement with Amtrak.

Amtrak operates on only two segments of KCSR line. Together, those segments total only about 20 miles. Both of the involved KCSR track segments host operations by Union Pacific Railroad Company ("UP"), and Amtrak operates on KCSR's track under Amtrak's contracts with UP. Accordingly, KCSR has very little direct dealing with Amtrak, and has no direct contractual relationship with Amtrak governing Amtrak's regularly-scheduled intercity passenger operations.

Comments on Proposed Regulations

Due to KCSR's general unfamiliarity with terms and conditions of Amtrak's operating agreements, the Board's proposed rules allowing Amtrak virtually unannounced access to any carrier's track under presumed emergency circumstances, without even waiting for the affected carrier to respond to Amtrak's application, are quite alarming. While some other carriers have extensive operating agreements with Amtrak, KCSR approaches the Board's NPRM without that background. As a result, procedurally the Board's proposals which (a) allow the Board to act on Amtrak's petition without awaiting a reply from the affected carrier; (b) require only that Amtrak *try* to serve its petition on an undefined employee of the affected railroad; and (c) require the Board to act on Amtrak's application within one business day regardless of circumstances, are extremely worrisome. Moreover, substantively the Board should require that Amtrak's application specifically provide for full liability coverage and full compensation to the affected carrier, and that Amtrak agree to abide by the operating limitations applicable to freight trains on the affected carrier's lines, before Amtrak begins operation on the alternative route, rather than having the Board decide these issues after the fact or without the host carrier's input. Finally, while it may not be possible to tightly define all instances that might constitute an "emergency," KCSR believes that the Board should make clear that the Board envisions invoking the proposed

regulations only in unforeseen emergency circumstances of short duration, not as a means for Amtrak to avoid a short delay, or to test new routes, or to run excursions or special trains or other trains that are not part of its normal, scheduled intercity passenger operation. By making adjustments to its proposed regulations in these areas, KCSR believes that the Board will be providing a necessary degree of balance between Amtrak's operating desires and the safety and operations of the temporary host carrier.

Procedural Issues. The Board's proposed regulations should require more extensive and targeted efforts by Amtrak to serve its application on the affected carrier, and should allow the affected carrier a reasonable, albeit abbreviated time to investigate and reply to Amtrak's application.

The Board's proposed rules provide that Amtrak show that it "serve[d or made its best efforts to serve] its application upon the representative(s) of the carrier(s) contacted in its efforts to reach a consensual agreement governing Amtrak emergency routing." Proposed 49 CFR 1034.2(c). Because there are no criteria to determine what "representative of the carrier" Amtrak "contacted in its efforts to reach a consensual agreement," the Board's proposal only to require Amtrak's "best efforts to serve" that person provides little assurance that Amtrak's application will actually reach officials of that carrier empowered to respond to the application, let alone enable them to do so within the time frame of less than a day.

At the very least, the proposed rules should require Amtrak to serve its application on the affected railroad's Chief Executive Officer, Chief Operating Officer and Chief Legal Officer, if the carrier has such officials, by both facsimile and overnight delivery service. Moreover, the rules should *require* that the Board's staff discuss Amtrak's application with the affected carrier's CEO or COO before the Board acts on the application. Without such requirements,

KCSR submits, the Board may be acting in an information vacuum which could lead to granting Amtrak access under circumstances which could lead to unsafe insertion of Amtrak's operations into another carrier's operations and properties.

The Board should also allow more time for the affected carrier's reply. Subsection 1034.2(e) requires the Board to grant or deny Amtrak's application "*no later than 1 business day*" from the application's filing. Moreover, the proposed rules merely provide that, "The Board will consider replies as time permits." Proposed 49 CFR 1034.2(d). Altogether, these rigid and virtually instantaneous time frames could effectively preclude meaningful participation by the affected carrier. Such preclusion could lead to unsafe circumstances, such as forcing Amtrak onto a line where a bridge repair is underway, where a hazmat spill is being remediated, where a track defect has been detected but repair equipment has not yet reached the scene, or any of a variety of other circumstances where the rush to rule mandated by the Board's proposed regulations could be disastrous. It is unclear what circumstances would require acting without meaningful input from the carrier whose property was to be used, which could lead to potentially unsafe and certainly unplanned operation better conducted after close coordination with the host carrier. In short, for safety's sake, the Board should require that every reasonable effort be made to obtain and consider feedback from affected carrier prior to ruling on Amtrak's application.

Substantive Issues. Because the Board's proposed rules contemplate forcing Amtrak's operations onto an unwilling host's lines without determining the terms and conditions of the operation, the Board needs to require more information from Amtrak's application than specified in the proposed rules. Specifically, Amtrak's application should provide for full liability protection for the host carrier, full compensation to the host carrier, and an agreement to abide by the host carrier's rules and operating procedures governing the affected track.

A major issue with hosting Amtrak operations is the significant liability that may occur if something goes awry with those operations. This is particularly true under the Board's proposed rules, which hold out the prospect of running higher speed trains than usually run on the host's lines with virtually no notice to the host carrier, let alone advance notice to the communities where motorists cross the host carrier's lines daily.

The Board must bear in mind that Amtrak-related liability is a "but for" proposition for the detour host. That is, but for being required to host detoured Amtrak trains, the host freight carrier would not be exposed to the personal injury and property loss risks, and avoidable costs that arise from the imposition of a detour order.

Two solutions to this problem are necessary. First, Amtrak should be required to provide liability coverage to the temporary host carrier covering all liability that the host may incur, other than that which may be due to the host's gross negligence or willful misconduct. *See generally Application of The National Railroad Passenger Corp. Under 49 U.S.C. 24309(A)-- Springfield Terminal Railway Company, Boston and Maine Corporation, and Portland Terminal Company*, 3 S.T.B. 157, 1998 WL 1799020 (1998). Moreover, the Board should require that, to the extent this requirement is fulfilled through insurance, such insurance be in place and applicable to the temporary host before Amtrak begins operating on the temporary host's track, and that Amtrak's application include an insurance certificate naming the temporary host as an additional insured under Amtrak's applicable policies.

Second, Amtrak's operations should be confined to the same operating parameters – particularly operating speeds – as the operations of the host carrier's freight trains. Federal Railroad Administration ("FRA") regulations establish different operating speed limits for

freight and passenger operations for each track class.¹ However, many times citizens in communities bordering a rail line become accustomed to the typical operating speed with which the carrier owning the line operates, and adjust their behaviors – particularly how soon they expect a train to arrive at a grade crossing – to that normal speed. If suddenly Amtrak were to be added to the line and conduct operations under the Board’s proposed rules at speeds between 5 and 20 miles per hour faster than what the surrounding communities are accustomed to, accidents could occur. Furthermore, even when a rail line meets FRA standards for a certain class of track, there can be good faith disagreements about the safety of allowing increased operating speeds on that track. *Cf. National Railroad Passenger Corporation--Petition for Declaratory Order-- Weight of Rail*, 4 S.T.B. 416, 1999 WL 966889 (1999) (dispute over what weight of rail and what other track characteristics were required to allow safe Amtrak operations at 79 miles per hour). For all of these reasons, Amtrak’s application should be required to include Amtrak’s commitment to abide by the operating rules applicable to its temporary host’s freight operations, unless the host agrees otherwise.

¹ See Sec. 213.9 Classes of track: operating speed limits.

(a) Except as provided in paragraph (b) of this section and Sec. 213.57(b), 213.59(a), 213.113(a), and 213.137(b) and (c), the following maximum allowable operating speeds apply--
[In miles per hour]

Over track that meets all of the requirements prescribed in this part for--	The maximum allowable operating speed for freight trains is--	The maximum allowable operating speed for passenger trains is--
Excepted track.....	10	N/A
Class 1 track.....	10	15
Class 2 track.....	25	30
Class 3 track.....	40	60
Class 4 track.....	60	80
Class 5 track.....	80	90

Amtrak's application should also be required to state that Amtrak will bear all costs associated with its operation on the temporary host's track. There are likely to be special costs associated with Amtrak's operation on a track on which Amtrak does not normally operate. For example, Amtrak engineers would not have been qualified to operate on that territory and likely would need the host railroad to provide a pilot engineer (assuming one is available). There could be special fueling needs at locations where the host carrier does not normally fuel its locomotives. And Amtrak's presence on the line could prevent the host carrier from meeting existing contractual commitments (transit time or delivery schedule commitments to shippers, for example, or possibly delaying a scheduled track work contract), any of which could cause the host carrier liability under its contracts. Any such liability or penalties should fall to Amtrak. As there are myriad possible costs which would be difficult to catalog in the abstract, Amtrak should simply be required in its application to commit that it will bear all such costs.

Finding That an Emergency Exists. The tenor of the Board's proposed rules presupposes the existence of a genuine emergency situation; otherwise, there could be no justification for the Board's proposal to grant Amtrak access to another carrier's property with virtually no notice and possibly without even allowing the other carrier an opportunity to object. Accordingly, KCSR requests that the Board make clear that the relief its rules would provide shall be used very sparingly, and only in the event of a genuine emergency.

The Board should carefully limit the circumstances under which it would grant access under its proposed rules, including limiting the duration of such access. The Board's decision proposing the regulations states, "Periodically, an established Amtrak route becomes blocked or closed as the result of a derailment, unscheduled maintenance, severe weather, or other emergency." Each of the specified events—derailment, unscheduled maintenance and severe

weather – would be an event with little or no advance notice ahead of an Amtrak departure and could possibly occur while a train was en route. Moreover, these events would each be of short duration, probably less than a week in almost all circumstances. KCSR therefore anticipates, and asks the Board to confirm, that the Board will interpret “other emergency” in the same light – an unexpected event affecting ongoing regularly-scheduled Amtrak intercity movements (an “established Amtrak route,” as the Board states it) which is expected to last a few days at most.

By contrast, KCSR believes that occurrences which are anticipated ahead of time - such as if Amtrak desires to run a train which is not part of Amtrak’s current regularly-scheduled intercity network, or if Amtrak wants to explore expanding service to new areas - do not qualify as emergencies and would not entitle Amtrak to use the Board’s proposed procedures. Likewise, the duration of any access ordered should be for a very short term, as there is no justification for granting access for more than a few days under the essentially ex parte procedures in the Board’s proposed rules. Any re-route that lasts longer than a few days should be the result of appropriate bi-lateral negotiations between Amtrak and the targeted host freight carrier and not as a result of a Board order issued under its emergency detour authority. Although it is unlikely that Amtrak would abuse the proposed emergency procedures to force long-term arrangements, particularly where no genuine emergency exists, the Board should nevertheless include such safeguards in using its proposed rules.

CONCLUSION

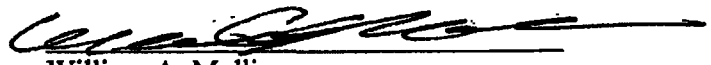
Where, as here, the Board is intending to develop a highly-expedited emergency process, the agency should take great care to eliminate unnecessary contingencies and uncertainty, not only with respect to the emergency procedures it seeks to adopt, but also with respect to the terms and conditions by which affected carriers can and should expect to be governed.

Accordingly, KCSR urges the Board to revise the procedural provisions of its new rules to

maximize the possibility for the temporary host carrier to be apprised of Amtrak's application and provide a meaningful response before the Board acts. Furthermore, KCSR requests that any application under these procedures be required to specifically provide full liability protection and full cost reimbursement to the temporary host, and contain Amtrak's commitment, before operations begin, to operate under the freight carrier's operating limitations (including speed limits).

Respectfully submitted,

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Attorneys for The Kansas City Southern
Railway Company

Dated: February 7, 2011

CERTIFICATE OF SERVICE

I have this day served a copy of the foregoing Comments Of The Kansas City Southern Railway Company upon all other known parties of record by depositing a copy in the U.S. mail in a properly addressed envelope with adequate first-class postage thereon prepaid, or by other, more expeditious means.

Dated: February 7, 2011


William A. Mullins
Attorney for The Kansas City
Southern Railway Company